Larut Matang Supermarket Sdn Bhd v Liew Fook Yung

HIGH COURT (TAIPING) — CIVIL SUIT NO 22-9-92(91)
ABDUL MALIK ISHAK J
22 SEPTEMBER 1994

Contract *— Void contract — Moneylending — Deposit for rent of building when constructed — Payment of interest to depositor — Whether illegal moneylending transaction — Whether defendant entitled to return of interest payments made — Whether depositor entitled to return of deposit*

Contract *— Time — Time of the essence — Delay in obtaining approval of building plans — Whether delay due to plaintiff — Failure of defendant to terminate agreement — Whether defendant had waived time*

Contract *— Damages — Liquidated damages — Breach of agreement to rent buildings — Whether genuine pre-estimate of loss — Contracts Act 1950 s 75*

Contract *— Damages — Loss of rent — Agreement to rent building when completed — Building not constructed — Whether defendant entitled to claim loss of rent*

Moneylenders *— Deposit for rent — Payment of interest on deposit — Whether amounts to moneylending — Whether money must be lent as a business — Whether officer from licensing authority must be called to give evidence — Moneylenders Act 1951 s 3*

The plaintiff entered into a tripartite agreement dated 11 March 1978 ('the agreement') with the defendant and a third party to construct two four-storey buildings on two lots of land belonging to the defendant and the third party. Clause 14 of the agreement stated that time was to be of the essence of the agreement. The defendant and the third party agreed to bear the entire cost of construction of the buildings and, upon completion, to lease them to the plaintiff for 12 years. The plaintiff paid the defendant and the third party RM30,000 each as a deposit, and interest at the rate of 9.25%pa was payable by each of them to the plaintiff until construction works of the buildings commenced. However, there was a prolonged delay of about ten years in obtaining approval of the building plans through no fault of the plaintiff. During that time, the defendant had been kept informed of the various delays in obtaining approval and had, without the plaintiff's knowledge, obtained approval of his own building plans and commenced construction of a building on his lot of land. The defendant ignored the plaintiff's solicitors' notice to stop work and the plaintiff sought the return of the RM30,000 deposit from the defendant together with 9.25%pa interest thereon and RM30,000 as agreed damages as stipulated in cl 16 of the agreement. The defendant counterclaimed for the return of RM20,812.50 being the amount paid to the plaintiff as interest, and

special damages for the purported loss rental of the buildings from January 1981 till October 1990 at RM168,839.94. The issues were, inter alia: (i) whether the agreement was a moneylending transaction in breach of the Moneylenders Act 1951 ('the Act'); (ii) whether the plaintiff had breached the agreement by undue delay; and (iii) whether the plaintiff was entitled to the amount stipulated in cl 16 as agreed damages.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) The defendant had failed to show that the plaintiff was involved in the business of moneylending or that there was some degree of system and continuity in moneylending transactions. The Act is not intended to apply to individuals or companies or members of the public who lend money at an interest unless they do so as a business. Therefore, the plaintiff was not a moneylender and the agreement was valid in law.

(2) The plaintiff did not have to call a competent officer from the licensing authority to establish that it was not a moneylender under s 3 of the Act. It was sufficient to call a witness to give evidence that the plaintiff was not a moneylender and the witness submits himself to cross-examination on this point. As the plaintiff principal business was the running of a supermarket and departmental store, s 3 did not apply to it by virtue of s 2A(1)(h).

(3) The delay was caused by bureaucratic red tape and the plaintiff had at all times acted with due diligence and speed. Consequently, it had not breached the term as to time as set out in the agreement.

(4) In any event, the conduct of the defendant clearly showed that time had been waived and he had failed to revive it and make time of the essence of the agreement once again.

(5) The defendant could have terminated the agreement for undue delay but he chose not to do so and the plaintiff had suffered a detriment. The plaintiff could not obtain specific performance of the agreement as the defendant had himself constructed a building on his land.

(6) The sum of RM30,000 stipulated in cl 16 of the agreement should be the reasonable compensation due to the plaintiff as it had incurred expenses in order to get the project off the ground. As it was a genuine pre-estimate of the damage suffered by the plaintiff, the plaintiff need not have to prove such loss. The plaintiff was also entitled to the return of the RM30,000 deposit with interest of 9.25%pa from November 1986 to the date of issue of the writ and thereafter at 3%pa till the date of judgment.

(7) The defendant's counterclaim for the return of RM20,812.50 paid to the plaintiff in the form of interest would fail as the payments were perfectly legitimate and were covered by cl 9 of

A the agreement. The defendant was bound by the agreement and could not resile from it.

(8) Clause 5 of the agreement was a bar to the defendant's counterclaim for the loss of rental of the buildings as the plaintiff could not be accountable for an event which did not happen. Since the buildings were not constructed, the plaintiff could not have leased them for a term of 12 years as stipulated in cl 5.

Obiter:

Where a vital issue is not raised in the pleadings, it cannot not be allowed to be argued nor can it succeed on appeal. Therefore, the defendant's argument that the agreement had been discharged by frustration could not be allowed as it was not pleaded.

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian tiga pihak yang bertarikh 11 Mac 1978 ('perjanjian itu') dengan defendan dan suatu pihak ketiga untuk membina dua buah bangunan empat tingkat di atas dua lot tanah yang dipunyai oleh defendan dan pihak ketiga itu. Fasal 14 perjanjian itu menyatakan bahawa masa adalah sangat penting untuk perjanjian itu. Defendan dan pihak ketiga tersebut telah bersetuju membiayai keseluruhan kos pembinaan bangunan itu, dan apabila mereka siap, untuk menyewakannya kepada plaintif selama 12 tahun. Plaintif telah membayar defendan dan pihak ketiga itu RM30,000 setiap orang sebagai suatu deposit, dan faedah pada kadar 9.25% setahun kena dibayar oleh mereka masing-masing kepada plaintif sehingga kerja pembinaan bangunan itu bermula. Bagaimanapun, terdapat suatu kelengahan dalam pemerolehan kelulusan pelan bangunan itu yang berlanjutan selama lebih kurang sepuluh tahun yang tidak disebabkan oleh plaintif. Sepanjang tempoh itu, defendan telah diberitahu tentang berbagai kelengahan dalam mendapatkan kelulusan itu dan, tanpa pengetahuan plaintif, telah mendapatkan kelulusan untuk pelan bangunannya sendiri dan memulakan pembinaan sebuah bangunan di atas lot tanahnya. Defendan tidak menghiraukan notis daripada peguamcara plaintif supaya menghentikan kerja pembinaan itu dan plaintif telah menuntut pengembalian deposit RM30,000 daripada defendan bersama dengan faedah pada kadar 9.25% setahun dan RM30,000 sebagai ganti rugi yang dipersetujui seperti yang ditetapkan di dalam fasal 16 perjanjian itu. Defendan telah menuntut balas untuk pengembalian jumlah RM20,812.50 yang telah dibayar kepada plaintif sebagai faedah dan ganti rugi khas untuk kehilangan sewa bangunan yang dikatakan itu dari Januari 1981 hingga Oktober 1990 sebanyak RM168,839.94. Isu-isu kes ini adalah, antara lain: (i) sama ada perjanjian itu merupakan suatu transaksi pemberipinjaman wang yang melanggar Akta Pemberipinjam Wang 1951 ('Akta itu'); (ii) sama ada plaintif telah memungkiri perjanjian itu oleh kelengahannya yang melampau;

dan (iii) sama ada plaintif berhak mendapat jumlah yang ditetapkan di dalam fasal 16 sebagai ganti rugi yang dipersetujui. A

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Defendan gagal menunjukkan bahawa plaintif terlibat di dalam perniagaan memberi pinjaman atau bahawa terdapat suatu takat sistem dan kesinambungan di dalam transaksi memberipinjam wang. Akta itu tidak dimaksudkan untuk terpakai kepada individu atau syarikat atau orang awam yang meminjam wang pada suatu kadar faedah kecuali jika mereka berbuat demikian sebagai suatu perniagaan. Oleh itu, plaintif bukanlah seorang pemberipinjam wang dan perjanjian itu sah di sisi undang-undang. B C

(2) Plaintif tidak perlu memanggil seorang pegawai kompeten daripada pihak berkuasa perlesenan untuk membuktikan bahawa ia bukan seorang pemberipinjam wang di bawah s 3 Akta itu. Adalah mencukupi untuk memanggil seorang saksi untuk memberi keterangan bahawa plaintif bukan seorang pemberipinjam wang dan saksi itu menyerahkan diri untuk diperiksa balas tentang perkara itu. Oleh kerana perniagaan utama plaintif adalah menjalankan sebuah pasaraya dan gedung serbaneka, s 3 tidak terpakai kepadanya mengikut s 2A(1)(h). D E

(3) Kelengahan itu telah diakibatkan oleh pita merah birokratik dan plaintif telah pada setiap masa bertindak dengan ketekunan dan kepantasan yang wajar. Oleh itu, ia tidak memungkiri terma mengenai masa yang telah ditetapkan di dalam perjanjian itu.

(4) Walau bagaimanapun, kelakuan defendan jelas menunjukkan bahawa masa telah diketepikan dan beliau gagal menghidupkannya semula dan menjadikan masa sangat penting untuk perjanjian itu sekali lagi. F

(5) Defendan boleh menamatkan perjanjian itu kerana kelengahan yang berpanjangan itu tetapi memilih supaya tidak berbuat demikian dan plaintif telah terjejas. Plaintif tidak boleh mendapatkan pelaksanaan spesifik perjanjian itu kerana defendan sendiri telah membina sebuah bangunan di atas tanahnya. G

(6) Jumlah RM30,000 yang ditetapkan di dalam fasal 16 perjanjian itu seharusnya merupakan pampasan yang wajar yang kena dibayar kepada plaintif kerana ia telah menanggung perbelanjaan supaya memulakan projek itu. Oleh kerana jumlah itu merupakan suatu anggaran terlebih dahulu yang sebenar tentang kerugian yang dialami oleh plaintif, ia tidak perlu membuktikan kerugian tersebut. Plaintif juga berhak mendapatkan kembali deposit RM30,000 dengan faedah sebanyak 9.25% setahun dari November 1986 hinga tarikh writ dikeluarkan dan selepas itu pada kadar 3% setahun hingga tarikh penghakiman. H I

(7) Tuntutan balas defendan untuk pengembalian RM20,812.50 yang telah dibayar kepada plaintif dalam bentuk faedah telah

gagal kerana bayaran itu sah dan dirangkumi oleh fasal 9 perjanjian itu. Defendan diikat oleh perjanjian itu dan tidak boleh menarik diri daripadanya.

(8) Fasal 5 perjanjian itu menjadi rintangan kepada tuntutan balas defendan untuk kehilangan sewa bangunan itu kerana plaintif tidak boleh dijadikan bertanggungjawab terhadap suatu kejadian yang tidak berlaku. Oleh kerana bangunan itu tidak dibina, plaintif tidak mungkin menyewakan mereka bagi tempoh 12 tahun seperti yang ditetapkan di dalam fasal 5.

Obiter:

Di mana sesuatu isu tidak ditimbulkan di dalam pliding, ia tidak boleh dihujahkan dan juga tidak boleh berjaya apabila rayuan dibuat. Oleh itu, hujah defendan bahawa perjanjian itu telah dilepaskan oleh kekecewaan tidak boleh dibenarkan kerana ia tidak dijadikan pli.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No A02–118–94.]

Notes

For cases on liquidated damages, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1467–1472; [1993] Mallal's Digest 465.
For cases on time being of the essence, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2275; [1993] Mallal's Digest 518.
For cases on void contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2295–2310; [1993] Mallal's Digest 520.

Cases referred to

Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC 179 (folld)
Charles Rickards Ltd v Oppenheim [1950] 1 KB 616; [1950] 1 All ER 420 (folld)
Edgelow v MacElwee [1918] 1 KB 205 (folld)
Esmail Sahib v Noordin [1951] MLJ 98 (folld)
Kirkwood v Gadd [1910] AC 422; [1908–10] All ER Rep 768 (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (folld)
Lee Tian Hua v Chan Moi Hiong [1988] 3 MLJ 406 (folld)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (folld)
Litchfield v Dreyfus [1906] 1 KB 584 (folld)
Newton v Pyke (1908) 25 TIR 127 (folld)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9 (folld)
Quah Ban Poh v Dragon Garden Pte Ltd [1988] 2 MLJ 159 (folld)
Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading [1972] 1 MLJ 21 (folld)
Shobri bin Hasan v Ramalingam [1993] 1 MLJ 263 (folld)
Teng Ah Seah v Teh Choo Pheng 2 MC 253 (folld)
WJ Alan & Co v El Nasr Export and Import Co [1972] 2 QB 189; [1972] 2 All ER 127; [1972] 2 WLR 800 (folld)

Webb v Hughes (1870) LR 10 Eq 281 (folld) A
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (folld)
Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14 (folld)

Legislation referred to

Contracts Act 1950 s 75 B
Moneylenders Act 1951 ss 2A(1)(h), 3, 5(1)
Contract Act s 74 [Ind]

A Selvanathan (*Kean Chye & Sivalingam*) for the plaintiff.
Ngan Siong Hing (*Abbas & Ngan*) for the defendant. C

Abdul Malik Ishak J: The plaintiff entered into a tripartite agreement dated 11 March 1978 ('the agreement') with the defendant and another party known as Liew Yoke Poy ('the third party') to construct two four-storey buildings on Lots 264 and 265 belonging to the defendant and the third party, respectively. Though the plaintiff's land at Lot 263 was not D incorporated in the agreement, it became obvious in the course of the trial that the plaintiff's land was also earmarked for development. The defendant and the third party agreed to bear the entire costs and expenses of construction and, thereafter upon completion, the buildings were to be leased for a term of 12 years to the plaintiff. The plaintiff paid the defendant and the third party RM30,000 each as a deposit at the rate of E 9.25% interest payable by each of them to the plaintiff until construction works of the said buildings commenced. The plaintiff had to incur the requisite fees and expenses for submitting the relevant plans to the proper authorities. Somehow, by a stroke of misfortune, the agreement fell through and the plaintiff now sought for the return of the RM30,000 from the F defendant together with 9.25%pa interest thereon and RM30,000 as agreed damages. The defendant counterclaimed for the return of RM20,812.50 being the amount paid in the form of interest to the plaintiff and special damages for the purported loss of income from the rentals of the buildings from January 1981 till October 1990 at RM168,839.94, the figure that was arrived at and amended by the defendant's counsel in the midst of leading G evidence for the defendant.

In the course of the trial, several issues crystallized and foremost were:

(1) Whether the agreement was a moneylending transaction which contravened the provisions of the Moneylenders Act 1951 H (Rev 1989) ('the Act') and, consequently, void?

(2) If the answer to question (1) is in the negative, the next question to ask would be this: whether the plaintiff had breached the term as to time being the essence of the agreement by the undue delay caused by the relevant authorities in granting their approvals for the building I plans as submitted by the plaintiff?

(3) Whether the defendant had enlarged time and thereby waived time as the essence of the agreement?

(4) Whether the defendant by his conduct had acted unconscionably by submitting and getting the approval of the relevant authorities for his own plans?

(5) Whether the defendant's counterclaim sustainable under the agreement?

(6) What was the measure of damages to be utilized bearing in mind that the plaintiff cannot insist on specific performance of the agreement as the defendant had by himself constructed his own building on Lot 264?

First issue

In regard to the first issue, it is not disputed that the plaintiff paid the defendant RM30,000 as a deposit with interest at the rate of 9.25%pa. It was argued that the plaintiff benefited for a continuous period of eight years receiving the interest in his capacity as an unlicensed moneylender and, consequently, was in breach of s 5(1) of the Act, which section reads as follows:

> Every moneylender residing and carrying on business in Malaysia, whether as principal or as agent, shall take out annually in each State in which he carries on the business of moneylending a licence.

The plaintiff's counsel, on the other hand, sought to justify the collection of interest on the grounds that it was solely meant to expedite the construction of the buildings and to prevent delay on the part of the defendant in adhering to the terms and conditions of the agreement. Ramakrishnan s/o Kuppusamy (SP1) ('Ramakrishnan'), a director of the plaintiff's company, was categorical in his evidence that though the plaintiff collected interest on the deposit, the plaintiff was not a moneylender. Ramakrishnan further explained under cross-examination and reiterated that the charging of interest on the deposit was to expedite the construction of the building. This explanation finds support in cl 9 of the agreement which reads, inter alia, as follows (the relevant portions only):

> ... such interest shall cease to be payable immediately after construction works of the said buildings shall have commenced *provided always* that such interest shall resume running until completion of the said buildings should the first party [referring to the third party] and the second party [referring to the defendant] fail or otherwise be unable to complete the said buildings within the twelve (12) month period as stipulated in cl 7 hereof.

To say the least, the genuine intention of the plaintiff to charge interest on the deposit is clearly reflected in cl 9 of the agreement and that is, '... such interest charged shall cease the moment the construction begins'. The plaintiff exhibited its magnanimous gesture when it held onto the notion as reflected in Ramakrishnan's evidence that the interest provision was of secondary importance and even without interest, it was prepared to proceed with the contract.

Whether the plaintiff is really a moneylender or otherwise, is basically a question of fact, and not of law, and it must be answered according to the

facts and circumstances of the case (see *Kirkwood v Gadd* [1910] AC 422 especially at p 424; [1908–10] All ER Rep 768 at p 771). On this point, Ramakrishnan emphatically said:

> Not the policy of my Company to give loans to people to build buildings and charge interests thereon. My company is a supermarket and a departmental store.

Ramakrishnan also denied strenuously that his company was a moneylender.

The defendant, on the other hand, failed to elicit an ounce of evidence to show that the plaintiff was in fact involved in the business of moneylending nor was there evidence adduced to show some degree of system and continuity in moneylending transactions. All that the defendant succeeded was to ask perfunctory questions like the amount of interest collected and whether the plaintiff had a moneylending licence, etc, etc. These would certainly be of little help to the defendant. The plaintiff here never advertised nor announced to the whole world or held itself out in any way whatsoever as carrying on a moneylending business. Thus, the plaintiff clearly falls under the category as described by Rigby J in *Teng Ah Seah v Teh Choo Pheng* 2 MC 253 in the following terms:

> I am fully satisfied on the facts of this case that the transactions referred to in evidence were entirely without system or continuity, that the plaintiff never advertised or announced himself or held himself out in any way as carrying on a moneylending business. I am satisfied, therefore that he was not a moneylender within the meaning of the Ordinance and that he is accordingly entitled to judgment against the defendant.

Put in another way, the defendant failed miserably to elicit valuable and cogent evidence through Ramakrishnan and Dato' Cheong Kok Leong (SP6) ('Dato' Cheong'), that the plaintiff had, on previous occasions, occasionally lent money at a special rate of interest and with some degree of system and continuity. I venture to say that even if (and there is no evidence to support it) there is evidence that the plaintiff had occasionally lent money at a remunerative rate of interest, that would not be enough to establish that the plaintiff is engaged in the moneylending business. The defendant must prove further that there was some degree of system and continuity on the part of the plaintiff in the moneylending transactions (*Edgelow v MacElwee* [1918] 1 KB 205; *Litchfield v Dreyfus* [1906] 1 KB 584; and *Newton v Pyke* 25 TIR 127).

In my judgment, the plaintiff was charging interest on the sum of RM30,000 deposited to the defendant at the rate of 9.25%pa and this was clearly permissible under cl 9 of the agreement. This would, however, bring into operation s 3 of the Act which enacts as follows:

> Save as excepted in s 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

The learned counsel for the defendant took advantage of this provision and argued that the plaintiff should have called a competent officer from the licensing authority to establish that the plaintiff was not a moneylender.

With respect, the plaintiff need not take this course of action. It would be sufficient, as was done here, when Ramakrishnan gave evidence to the effect that the plaintiff was not a moneylender and submitted himself to cross-examination on this point (*Esmail Sahib v Noordin* [1951] MLJ 98 and *Lee Tian Hua v Chan Moi Hiong* [1988] 3 MLJ 406). Ramakrishnan's evidence established that the plaintiff are running a supermarket and a departmental store. In fact, this fact was also adverted to in the agreement. Thus, notwithstanding that the plaintiff had advanced RM30,000 to the defendant and levied interest thereon, the plaintiff's principal business being supermarket/departmental store, the Act should not apply to it (see ss 2A(1)(h) and 3 thereof).

It is now an established law that the Act does not strike at moneylending per se but at moneylenders and especially at the loans lent by it. It is also an established law that the Act is not intended to apply to an individual or a company or any member of the public who lends money at an interest unless they do so as a business (*Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14, FC and *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9, FC).

For the foregoing reasons, I am satisfied and it is my judgment that the plaintiff is not a moneylender and that the agreement between the parties is valid in law.

Second issue

This brings me to the second issue pertaining to the delay in submitting the plans to the relevant authorities. It was the defendant's contention that the plaintiff was instrumental for the prolonged delay in obtaining the approvals from the relevant authorities and such delay had caused loss and damage to the defendant. The plaintiff argued otherwise and submitted that it was not responsible for the delays as it had no control over the relevant authorities. The power to approve building plans was not with the plaintiff but with the relevant authorities. At this juncture, it would be prudent to examine briefly the facts of the case.

On 11 March 1978, the parties signed the agreement. On 18 August 1978, some five months later, the first set of building plans (P3) was lodged and filed with the Majlis Daerah Kuala Kangsar ('MDKK') by the plaintiff's architect — the architect that was agreed upon by the parties as set out in cl 3 of the agreement. A year later, to be precise, on 3 August 1979, the plaintiff was informed that the building plans could not be approved because the state government of Perak had yet to approve the master plan for the town of Kuala Kangsar (see bundle A at p 22). This shocking news was conveyed by the Pejabat Lembaga Pengurus Kerajaan Tempatan Kuala Kangsar ('PLPKTKK') to the plaintiff. The pengurus of PLPKTKK signed the letter dated 3 August 1979 and he stated thus:

> Cadangan membina rumah kedai supermarket empat tingkat di atas Lot 263–265 Jalan Kangsar, Kuala Kangsar
>
> Berhubung dengan perkara di atas merujuk kepada surat tuan, 685 LLC/KK–78, bertarikh 14 Februari 1979 bahawa pelan pusat Bandar Baru

Kuala Kangsar Bil A5/7964/1 itu belum lagi diluluskan oleh pihak Majlis Kerajaan Negeri Perak. A

Dengan ini permohonan tuan untuk kelulusan adalah ditangguhkan buat sementara waktu.

Sekian dimaklum.

Saya yang menurut perintah B
— Sgd —
Pengerusi PLPKTKK

Obviously development came too fast for Kuala Kangsar to take at too short a time. What did the plaintiff do in the meantime? Dato' Cheong took onto himself to enquire, made visits to MDKK and even wrote a C letter to MDKK (see bundle A at p 23). There were numerous letters being exchanged between the relevant government departments as can be seen in the testimonies of Shahidin bin Mohd Yusof (SP3)('Shahidin'), Mastor bin Abdullah (SP4) and Mohd Idris bin Judin (SP5) pertaining to the building plans as submitted by the plaintiff. It was only on 8 July 1980 (see bundle A at pp 26–27), some two years later, that the MDKK wrote D to the plaintiff's architect and directed the latter to amend the plans as submitted on 18 August 1978. The MDKK also imposed 22 conditions for the plaintiff to comply with (see bundle A at pp 26–27). Out of these conditions, only two need to be highlighted and they are:

(1) Sebahagian tanah yang terlibat dengan rezab jalan 100 kaki hendaklah E diserahkan.

(2) Sebahagian daripada tanah kerajaan di bahagian belakang lot-lot ini hendaklah diperolehi terlebih dahulu bagi mencukupi ukuran panjang lot-lot ini dan juga bagi lorong belakang 20 kaki.

Ramakrishnan stated in his evidence that MDKK also required the plaintiff F to surrender 25ft of the reserved land in front of the proposed building to the government and to apply for the government land at the back of the proposed building measuring approximately 10ft. Without further ado, the plaintiff immediately on 21 July 1980 applied to the Pejabat Tanah Kuala Kangsar ('PTKK') to surrender and realienate the land as required by G MDKK. There was still no response from PTKK and the plaintiff had no choice but to forward a letter dated 31 March 1983 enquiring about the matter (see bundle A at p 31). The delay persisted and it was only on 25 July 1985 that PTKK wrote a letter to the Jabatan Perancang Bandar dan Desa ('JPBD') and recommended that the plaintiff be allowed to surrender not 25ft but 15ft in front of the proposed building. By letter H dated 31 October 1985, JPBD rejected PTKK's recommendations (see bundle A at pp 47–48). Two years later, to be precise, it was 23 October 1987, MDKK suddenly had a change of heart and decided to drop the two highlighted conditions as stated above. This meant that the plaintiff was at liberty to amend its building plans according to the site plan (see I bundle A at p 58) The amended plans (P2) were quickly prepared by the architect and on 2 November 1987, the plaintiff wrote a letter to the defendant and sought the defendant's confirmation to proceed with the project (see bundle A at p 61). By an undated letter which was received by

the plaintiff and bore the stamp with the legend 'Received 25 Feb 1988 LMS (illegible) Sdn Bhd', the defendant confirmed that he had no objections to the amended plans (P2) being submitted to the relevant authorities (see bundle A at p 62). This prompted the plaintiff to direct its architect to prepare the amended plans (P2), but the defendant refused to sign the amended plans (see bundle A at pp 67 and 68). What is interesting to note is this: the third party is the sister of the defendant and this fact surfaced when the defendant gave evidence in court. But the defendant testified that he did not know whether his sister (the third party) agreed with the amended plans (P2) and this was contrary to the evidence of Yeoh Kok Liang @ Yeoh Kok Leong (SP2) ('Yeoh'), the pelukis pelan bangunan berdaftar. Yeoh testified that the third party had signed the amended plans (P2), an assertion that found support in bundle A at p 63 where the third party by letter expressed her strong support for the amended plans (P2).

The chronology of events itemized above would show the typical bureaucratic red tape that existed in the government departments then and, for this, the plaintiff should not be blamed. In my judgment, the plaintiff had at all times acted with due diligence and speed and, consequently, had not breached the term as to time as set out in the agreement.

Third issue

The third issue is whether the defendant had enlarged time and, consequently, waived time as the essence of agreement. Clause 14 of the agreement states as follows: 'Time wherever mentioned in this agreement shall be of the essence of this agreement'. What did the defendant do to show that he had enlarged time? The defendant enquired through his solicitors by letter dated 29 November 1985 (bundle A at p 38) about the latest development of the project and the reason for the long delay. That letter also alleged that the plaintiff did not do anything to obtain the approval of the relevant authorities. The defendant testified that upon receipt of this letter, Dato' Cheong became angry and invited the defendant to attend the 33rd executive board meeting ('the board meeting') held on 13 December 1985. The defendant attended the board meeting held at the plaintiff's meeting room (bundle A at p 42) and the minutes of the board meeting clearly reflected that discussions were held in regard to the latest development of the project (bundle B at p 3). Ramakrishnan testified that the defendant had been briefed in regard to the delay of the project at the board meeting and the defendant did not raise a single objection regarding the delay, a fact that is clearly reflected in the minutes of the board meeting (bundle B at p 3). Events showed that the defendant was subsequently asked to give his confirmation for the continuation of the project (see bundle A at p 61) and the defendant willingly gave by letter his approval to the submission of the amended plans (bundle A at p 62).

The conduct of the defendant as set out above clearly showed that time has been waived and that time was no longer of the essence of the contract.

Mohamed Azmi J in *Sharikat Eastern Plastics Industry v Sharikat Lam Seng Trading* [1972] 1 MLJ 21 applied *Webb v Hughes* (1870) LR 10 Eq 281 at p 286, where Sir R Malins VC said:

> But if time be made of the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinte time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated.

The above dictum was also approved by Raja Azlan Shah J (as His Majesty then was) in *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 where his Lordship held that 'once time for completion was allowed to pass and the parties went on negotiating time was not longer of the essence of the contract ...'.

Three golden opportunities presented itself to the defendant to review time and to make time, once again, of the essence of the contract. The first golden opportunity was when the defendant's solicitors wrote a letter to the plaintiff dated 29 November 1985 (bundle A at p 38) where, inter alia, the defendant merely gave notice to the plaintiff to reply within seven days of receipt of the letter the enquiries raised in the letter but failed to give a notice fixing a reasonable time within which the approval of the plans should be obtained; and, of course, what is reasonable time is a question of fact to be decided on the circumstances of each case (see *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616; [1950] 1 All ER 420 as applied in *Quah Ban Poh v Dragon Garden Pte Ltd* [1988] 2 MLJ 159). The second golden opportunity was when the defendant attended the board meeting on 13 December 1985 where the defendant could have but did not, revive time. At the board meeting, in the presence of seven other board members, the defendant could easily have set the deadline wherein the building plans should be approved and if that were to happen the plaintiff must surely be bound by it. But unfortunately, this was not to be. The minutes of the board meeting bore testimony to this fact (see bundle B at p 3). Throughout the whole episode the defendant remained silent and misled the plaintiff into believing that the plaintiff had the authority to continue with the project without hindrance. It was in that frame of mind that the plaintiff instructed its architects to draw up the amended plans (P2). The defendant could have (and this forms the third golden opportunity), if he wanted to, revived time as the essence of the contract in 1988 when the defendant agreed that the plaintiff could submit the amended plans to the relevant authorities (see bundle A at p 62). Now, it is too late in the day for the defendant to allege that the plaintiff had deliberately delayed the project from taking off the ground.

In my judgment, the defendant had not only waived time as the essence of the agreement but also failed to revive time and make time, once again, the essence of the agreement. The principles of waiver as set

out in *WJ Alan & Co v El Nasr Export and Import Co* [1972] 2 QB 189; [1972] 2 All ER 127; [1972] 2 WLR 800 and applied vigorously in *Shobri bin Hasan v Ramalingam* [1993] 1 MLJ 263 should be applied to the defendant in this case.

Fourth issue

In regard to the issue of the unconscionable conduct of the defendant, the evidence showed that the defendant had on the sly applied for the approval of his building plans on 1 March 1988 and, subsequently, obtained its approval on 1 October 1988 (see the evidence of Shahidin). The speed at obtaining the approval has been explained in the course of the trial and it would appear that the impediments placed in the path of the plaintiff had been removed by time the defendant filed his building plans. Thus, the two highlighted conditions as stated above having been removed by letter dated 23 October 1987 (bundle A at p 58), the road was left clear for the defendant to hatch his nefarious scheme. It can be inferred that when the defendant gave his confirmation for the project to proceed on or about 22 February 1988 (bundle A at p 22), he was merely play-acting and pretended to go along with the projects. By that time, the defendant must have instructed his architects to draw the building plans which were finally lodged with MDKK on 1 March 1988. It is now obvious that the plaintiff had suffered a detriment at the hands of the defendant's unconscionable conduct. The plaintiff's plan to expand its business enterprise has come to an abrupt stop. The defendant was bold enough to ignore the plaintiff's solicitors notice to stop immediately the construction of the building (see bundle A at p 69). It is pertinent to point out that at the board meeting on 13 December 1985, the defendant could have terminated the agreement for undue delay but he chose not to do so and, by his own admission, had not given any notice of termination of the agreement to the plaintiff.

Fifth issue

The defendant counterclaimed for the return of RM20,812.50 being the amount paid in the form of interest. Such payment was perfectly legitimate as it was covered by cl 9 of the agreement. The defendant being one of the signatories to the agreement must be bound by the terms of the agreement and he cannot resile from it.

On the question of the loss of rentals of the buildings from January 1981 to October 1990 at RM168,839.94, cl 5 of the agreement would bar the defendant from claiming such sums. How could the plaintiff be accountable for an event which did not happen? The buildings on the lots as specified in the agreement were not constructed at all. Without the buildings, how could the plaintiff lease them for a term of 12 years as stipulated in cl 5 of the agreement?

Sixth issue

Finally, in regard to the issue of the measure of damages to be assessed by the court, it must be borne in mind that the plaintiff cannot insist on

specific performance of the agreement as the defendant, on the sly, had himself constructed his own building on Lot 264. What's now left for the plaintiff to do would be to claim for damages for breach of contract as stipulated in cl 16 of the agreement.

Section 75 of the Contracts Act 1950 enacts as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

My understanding of s 75 of the Contracts Act 1950 in the context of this case is this: in every case, the court must determine what is the reasonable compensation. But the cases seem to suggest a trend that the plaintiff cannot recover, simpliciter, the sum stipulated in the agreement, whether as a penalty or as liquidated damages. The plaintiff must prove the actual damages suffered by him unless the sum named is a genuine pre-estimate (*Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179). Whatever language one uses to describe the remedy whether as a penalty or as liquidated damages, the result would still be the same in that the court must determine what is the reasonable compensation. Lord Hailsham LC in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 especially at p 92 in delivering the judgment of the Board said of s 74 of the Indian Contract Act (equivalent to our s 75 of the Contracts Act 1950) in the following terms:

> The reason in substance was that, though it is true that s 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance as penalty or a genuine pre-estimate of the damage likely to be suffered, these technical rules had developed entirely separately from the law relating to deposits and for a very long time no one thought that the section in the Contract Act which superseded them had any application to the deposit case, or, at least, wherever the point was argued, it was rejected by the Indian courts.

Flowing from these cases, the effect would be this: any stipulated sum in a contract which is meant to be liquidated damages cannot be recovered unless the court is satisfied that it is a reasonable sum and may order the sum to be paid as damages.

From the evidence thus far adduced, the defendant testified that he had left the whole project in the hands of Dato' Cheong, the chairman of the plaintiff. Expenses must have been incurred by the plaintiff in employing architects and surveyors to draw the necessary building and survey plans in order to get the project off the ground in compliance with cl 2 of the agreement. Looking at this angle, it would not be wrong to say that the sum stipulated in cl 16 of the agreement is a genuine pre-estimate of the

damage suffered by the plaintiff and, consequently, the plaintiff need not have to prove such loss. In my judgment, RM30,000 in the form of agreed damages should be the reasonable compensation due to the plaintiff.

There is one final issue that needs mention. It is this. The defendant argued that the agreement had been discharged by frustration. The plaintiff sought to circumvent this argument by raising a vital and potent point, namely, the question of frustration was never raised at all in the pleadings; a point which found support in the recent decision of the Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428. In that case, the Supreme Court held that where a vital issue was not raised in the pleadings, it could not be allowed to be argued nor can it succeed on appeal. In the circumstances, this final issue should rightly be decided in favour of the plaintiff.

For the foregoing reasons, I gave judgment to the plaintiff. I allowed the plaintiff's claim for the return of RM30,000 paid to the defendant as a deposit and with 9.25%pa interest to run from November 1986 to the date wherein the writ was issued (20 August 1990) and thereafter at 3% till the date of judgment. The plaintiff was also entitled to RM30,000 as agreed damages being the reasonable compensation due to the plaintiff. The defendant's counterclaim was dismissed. I also made a further order that the plaintiff shall have the costs of these proceedings and these must be taxed.

Plaintiff's claim allowed; defendant's counterclaim dismissed.

Reported by Anne Khoo